BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLY CAVENDER,	)	
Claimant,	)	
VS.	)	
	)	Docket No. 251,176
PIP PRINTING, INC.,	)	
Respondent,	)	
AND	)	
	)	
DODSON INSURANCE GROUP,	)	
Insurance Carrier.	)	

ORDER

Respondent and its insurance carrier appealed the July 30, 2001 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on January 11, 2002 in Wichita, Kansas.

Appearances

Joseph Seiwert of Wichita, Kansas, appeared on behalf of claimant. Stephen J. Jones of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

Records and Stipulations

The record considered by the Appeals Board and the parties' stipulations are listed in the Award

ISSUES

This is a claim for an October 20, 1999 accident and injury to claimant's neck and upper back that resulted in neurosurgeon Paul Stein, M.D. performing a diskectomy and fusion of claimant's cervical spine. In the Award, Judge Frobish found claimant was entitled to a 27.25 percent permanent partial general disability award based upon a 12.5 percent task loss opinion given by Pedro A. Murati, M.D., and a 42 percent wage loss.[1]

[1] It is not clear in the Award how the ALJ computed claimant's wage loss. Judge Frobish says he compared claimant's average post-injury earnings at Envelope Manufacturers of $248.13 per week, to her average weekly wage with respondent. But comparing $248.13 to the stipulated gross average weekly wage of $477.57 yields a wage loss of 48 percent. Even comparing $248.13 to claimant's $448.23 base average weekly wage with respondent, without including the amount of additional compensation, results in a 44.6 percent wage loss.

After the injury, respondent did not offer to return claimant to accommodated work. Claimant was able to find employment with another company, Envelope Manufacturers. That job may have eventually provided claimant with benefits similar to that which she had been earning at the time of her injury with respondent. Respondent contends that claimant's termination was voluntary and, therefore, the wage she earned at Envelope Manufacturers should be imputed to her, including the fringe benefits which she would have qualified for had she remained there. In the alternative, respondent argues that post-injury earnings of $320 per week be imputed based upon an ability to earn $8.00 per hour and comparable fringe benefits. However, claimant counters that she acted in good faith and was forced to quit the job with Envelope Manufacturers because of sexual harassment and an unacceptable work environment.

Respondent does not argue that claimant has failed to make a good faith job search effort, either before or after working at Envelope Manufacturers. But respondent argues that because claimant quit her job voluntarily it was not in good faith and, therefore, wages from that job, or a wage based on her ability to earn wages, should be imputed to claimant. Conversely, claimant contends that she acted in good faith at all times and, therefore, the ALJ's Award should be increased by using claimant's actual earnings and a 100 percent wage loss after she quit working for Envelope Manufacturers. By imputing the wage that claimant earned at Envelope Manufacturer to her, the ALJ apparently found claimant did not act in good faith in quitting that employment. In so finding, the ALJ drew a distinction between sexual harassment versus acts which violate claimant's sense of morality. The ALJ concluded claimant's reasons for leaving her job with Envelope Manufacturers fell within the latter.

The parties agree with the Administrative Law Judge's finding that claimant's functional impairment is 15 percent.

The nature and extent of claimant's disability, specifically the wage loss prong of the two-part work disability formula, is the only issue for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Board makes the following findings of fact and conclusions of law:

The Board finds the Award of the ALJ should be modified to award a work disability utilizing claimant's actual post-injury earnings.

Because claimant's injuries constitute an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e.[2]

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[3] and Copeland.[4] In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . . .[5]

The question becomes whether claimant made a good faith job search effort following her release to work after the injury and whether she acted in good faith when she quit the job with Envelope Manufacturers. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in Foulk, then claimant may be

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[2] *See* Pruter v. Larned State Hospital, ___Kan. ___, 26 P.3d 666 (2001); Depew v. NCR Eng'g & Mfg., 263 Kan. 15, 947 P.2d 1 (1997).

[3] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] Copeland at 320.

precluded from receiving an award based on a work disability.[6] It should be remembered, however, that in Foulk, there was a serious question about the claimant's credibility. Foulk's testimony that she could not perform the accommodated job was contradicted by a videotape showing her performing activities she had testified she was unable to do. Her credibility was, likewise, important to the question of the appropriateness of her restrictions, because the physician acknowledged they were based primarily on claimant's subjective complaints. Here, unlike in Foulk, the Board finds claimant to be credible. The test remains one of good faith, however, on the part of both claimant and respondent.[7]

After claimant's surgery and her release to return to work with restrictions, respondent made no offer to return claimant to work in an accommodated position. Claimant made a good faith job search effort and was successful in finding what was supposed to be full time light duty work with Envelope Manufacturers. That job, however, turned out to be less than 40 hours per week. It also turned out to be an untenable work environment. Claimant's uncontradicted testimony is that her supervisor made unwelcomed contact with her, including hugging and touching, and that he engaged in sexual relations with a coworker, not his wife, at the workplace. Claimant worked very closely with that supervisor's wife and this conduct bothered claimant a great deal. So she quit. Although respondent disputes the reasonableness of this decision, the record establishes that claimant acted reasonably and in good faith in making the decision to quit that job.[8] Furthermore, the Board finds claimant thereafter made a good effort to find appropriate work. Respondent does not dispute the reasonableness of claimant's job search efforts.

This case presents somewhat unusual facts that have not been directly addressed by our appellate courts. But Kansas appellate courts have held that a claimant may make a good faith effort and still be unable to perform accommodated work.[9] A claimant may, for example, be assigned work which does not exceed medical restrictions but which is beyond the claimant's ability or causes her symptoms to worsen. In spite of good faith efforts, a claimant may not be able to perform the job adequately. The courts have also found claimants to have acted in good faith when rejecting jobs that they could not do

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[6] *See* Swickard v. Meadowbrook Manor, 26 Kan. App.2d 144, 979 P.2d 1256 (1999); Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___Kan. ___ (1999).

[7] *See* Helmstetter v. Midwest Grain Products, Inc., ___ Kan. App.2d ___, 28 P.3d 398 (2001); Oliver v. The Boeing Company-Wichita, 26 Kan. App.2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999); Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[8] *See* Ford v. Landoll Corporation, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied*___ Kan.___ (2000); Niesz v. Bill's Dollar Stores, 26 Kan. App. 2d 737, 993 P. 2d 737, 993 P. 2d 1246 (1999); Parsons v. Seaboard Farms, Inc., 27 Kan. App. 2d 843, 9 P. 3d 591 (2000).

[9] *See* Guererro v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P. 2d 612 (1995).

and/or violated their restrictions.[10] In such cases the claimant was not denied a work disability and limited to a permanent partial disability award based upon impairment of function, nor was a wage imputed.

Therefore, as required by K.S.A. 44-510e(a), the Board will find that claimant is entitled to a work disability award based upon her actual wage earnings, averaged together with the 12.5 percent task loss opinion. From the date she was released to return to work following surgery until she became employed, claimant's wage loss was 100 percent. From the date claimant started work for Envelope Manufacturers until the last day she worked there, her wage loss was 48 percent. Thereafter, while claimant was again unemployed and looking for work her wage loss is again100 percent. In this case, because there is no gap in benefits, the award of permanent partial disability compensation calculates the same by using only the last wage loss percentage and the last percentage of work disability.[11] Therefore, the award will be calculated based upon a 56.25 percent permanent partial disability which is arrived at by averaging the 12.5% task loss with the 100% wage loss.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon Frobish, dated July 30, 2001, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kelly Cavender and against the respondent, PIP Printing, Inc., and its insurance carrier for an accidental injury which occurred October 20, 1999, and based upon an average weekly wage of $477.57 for 40.57 weeks of temporary total disability compensation at the rate of $318.40 per week or $12,917.49 followed by 219.05 weeks of permanent partial disability compensation at the rate of $318.40 per week or $69,745.52 for a 56.25 percent permanent partial general disability, making a total award of $82,663.01.

As of January 18, 2002, claimant is entitled to 40.57 weeks of temporary total disability compensation at the rate of $318.40 per week totaling $12,917.49, followed by 76.71 weeks permanent partial disability compensation at the rate of $318.40 per week totaling $24,379.89, for a total due and owing of $37,297.38 minus any amounts previously paid. Thereafter, claimant is entitled to 142.48 weeks permanent partial disability

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[10] *See* Edwards v. Klein Tools, Inc., 25 Kan. App. 2d 879, 974 P.2d 609 (1999); and Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P. 2d 440 (1997).

[11] *See* Frazee v. Golden Wheat, Inc., WCAB Docket No. 201, 840 (Dec. 2001); and footnote 9 at p. 8 in Wempe v. Topeka Winnelson, WCAB Docket No. 236, 505 (Oct. 2001).

compensation at the rate of $318.40 per week totaling $45,365.63 until fully paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Sweiwert, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director